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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE T. MORRAN, PETITIONER

v.

STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

B. Robert Ohle, and
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QUESTIONS PRESENTED

Whether the trial Court may make a finding of free and voluntary consent to a warrantless entry, search and seizure by relying primarily on the subjective impressions of the law enforcement officers who took part in the search, where the totality of the circumstances, with due weight being given to 'objective factors', indicates a lack of free and voluntary consent, when the defendant makes a pretrial motion to suppress the fruits of the warrantless search.

TABLE OF CONTENTS

	PAGE
Opinions below	I
Jurisdiction	II
Constitutional provisions involved	II
Statement	III-XIII
Reasons for granting the petition	XIV-XXV
Conclusion	XXVI
Appendix A	26-28
Appendix B	29-30
Appendix C	31
Appendix D	32-36
Appendix E	37-38
Certificate of Service	XXVII

TABLE OF AUTHORITIES

CASES:	PAGE
Bretti v. Wainwright, 439 F.2d 1042	19
Brown v. Illinois, 422 U.S. 590	17,20,21,24
Collins v. State, 310 So.2d 33	17,18
Correa v. State, 389 So.2d 1204	19
Engle v. State, 391 So.2d 245	--
Johnson v. United States, 333 U.S. 10	--
Judd v. United States, 190 F.2d 649	24
King v. State, 371 So.2d 120	--
Luxenburg v. State, 384 So.2d 742	--
Major v. State, 389 So.2d 1203	23
Mendenhall v. United States, ___U.S.__(1980)	17,18
Raffield v. State, 362 So.2d 138	18
Schneckloth v. Bustamonte, 412 U.S. 218	17,19
Talavera v. State, 186 So.2d 811	17,23
United States v. Ballard, 573 F.2d 913	17,19
United States v. Fike, 449 F.2d 191	19
United States v. Robinson, 625 F.2d 1211	17,18,19,20
United States v. Turner, 628 F.2d 461	17,18,19,20,2
Wong Sun v. United States, 371 U.S. 471 (1963)	16,20

Constitution:

Fourth Amendment

Fourteenth Amendment

IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

George T. Morran, by and through his attorneys, B. ROBERT OHLE and F. M. WELLS, JR., petition for a writ of certiorari to review the judgment of the Second District Court of Appeal of Florida, in this case.

OPINIONS BELOW

The opinion of the Second District Court of Appeal is reported at ___So.2d___. (App. A, infra 28). The denial of review by the Supreme Court of Florida is reported at ___So.2d___. (App. B, infra 30).

JURISDICTION

The judgment of the Second District Court of Appeal (App. A, infra 28) was entered January 13, 1982, and became final on March 11, 1982. A petition for review by the Supreme Court of Florida was denied effective March 29, 1982 (App. B, infra 30), at which time the Court denied in advance any motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> (N)o State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. Between four and five o'clock on the afternoon of Sunday, January 25, 1981, Pinellas County Sheriff's Sergeant Michael Hawkins was sent to investigate a call from the manager of the LaMark Charles Motel regarding suspicious activity there. The manager told Hawkins that several persons had been coming and going from Room No. 40 throughout the day, and that the occupants of the room had placed an abnormally great number of telephone calls through the motel's switchboard. The occupants had paid for the room in full and in advance.

After Hawkins had received a list of the numbers to which calls had been placed from Room No. 40, he set up a surveillance of that room from across the street. At about 5:30 P.M. Hawkins called for more officers to assist in the surveillance. Detective Lyttle and Hart arrived at approximately 6:15 and 6:30 P.M., respectively.

At about the same time Hawkins moved the surveillance team into Room No. 15 of the motel and directed Detective Voege to trace the telephone numbers obtained from the motel's manager. At about 9:30 P.M. Voege came to Room No. 15 with the names of the occupants at the locations of the traced telephone numbers.

About 11:00 P.M. Hawkins, Lyttle and Hart stopped a Mr. Rickerson who had just come from Room No. 40. Rickerson was searched bodily and questioned about activities in Room No. 40. No contraband was found on Rickerson and, while he admitted smoking one marijuana cigarette in Room No. 40, he denied knowledge of the presence of any large amount of marijuana or other contraband in that room. Rickerson specifically denied having gone to the room for the purpose of procuring contraband. He was not arrested and was allowed to leave at the end of the search and questioning.

At 12:00 Midnight a Mr. Rance entered Room No.

40, stayed fifteen minutes and left. Hawkins followed Rance's vehicle and pulled him over on Interstate 275. Hawkins read Miranda warnings to Rance, who elected to remain silent, after which he was released.

At about 1:00 A.M., Monday, January 26, 1982, Hawkins decided to enter Room No. 40. As the five Sheriff's Department officers then present approached the room they had their pistols drawn. Detective Lyttle knocked on the door of Room No. 40 and, in response, Petitioner drew back the window drapes and looked out. Lyttle, with gun in hand, put his ID and badge up against the plate glass window and said loudly enough to make himself heard inside the room, "Sheriff's Office; open the door, we want to speak with you," or similar words.

Petitioner opened the door and admitted the officers. No resistance was offered to the deputies by any occupant of the room. After the deputies were inside the room, Hawkins read Miranda warnings to Petitioner from a card prepared by the State's Attorney

Office. At no time was Petitioner advised of his right to refuse to consent to entry and search of the premises by the officers. Hawkins then seized drug paraphernalia lying on one of the beds in the room. He then asked Petitioner, whom he had not formally arrested, where the drugs were located. Petitioner pointed out the locations of some cocaine and some marijuana.

During the course of the interrogation Petitioner also admitted the presence of about five pounds of marijuana in his mother's car, of which he was at the time in constructive possession. The officers took the keys to the car, which was locked, and discovered marijuana in the trunk.

Petitioner was arrested for possession of cocaine, possession of marijuana and possession of drug paraphernalia.

2. Petitioner was charged with the possessory offenses for which he was arrested.

Petitioner made a pretrial motion to suppress the evidence seized by the deputies. The question of whether Petitioner, as an occupant with a valid possessory interest in the motel room, had standing to object to the warrantless entry, search and seizure, was passed upon by the trial Court in the following manner:

> The Court finds the defendant Moran (sic) had a joint possessory interest in Room 40...; that he is entitled to and did expect privacy from governmental intrusion while in the room which, of course, gives him standing as to certain premises.
>
> (T)he Court finds...he has standing to suppress seizure of anything on those premises.

The State then attempted to show by the testimony of Officers Hawkins and Lyttle that Petitioner had given his consent to their entry and search of his motel room. They testified to the course of events outlined in the statement of the facts hereinabove. They testified specifically to the following facts:

1. That the entry was made at approximately 1:15 A.M.

2. That there were five officers present.

3. That the officers had pistols drawn.

4. That one officer showed his badge at the window.

5. That there was insufficient probable cause to support a warrant, and that there was no warrant.

6. That Petitioner was not warned that he had a right to refuse to consent to the entry and the search.

7. That Miranda warnings were read to Petitioner before he was arrested

8. That the search took place before Petitioner was arrested.

9. That the purpose of the entry and search was "To continue my investigation".

10. That Petitioner, upon opening the door to the officers, said, "Come on in," or similar words.

The pertinent portions of this testimony are set forth in Appendix D, 32 infra.

At the end of the State's evidence, defense counsel in his argument raised the question brought to this Court on this Petition in the following manner:

If the Court please, the State has not met its burden and the motion should be granted. The law is real clear on point that there wasn't a lawful arrest, and there wasn't probably (sic) cause or exigent circumstances, and it wasn't pursuant to stop and frisk. I think they are depending on the alleged consent.

Judge, the case law is very clear that even acquiescent (sic), for the point of argument, not to say there was consent, but that somewhat acquiescent (sic) to authority, that is not consent.

* * *

(T)he taint of illegal entry based upon acquiescent (sic) to the show of authority by the police department standing there with guns and making a demand to open the door does not relieve them of that necessity to get a search warrant even where later there is a confession or arrest made from that legal (sic) entry. Anything after that is an attempt to find something based on the Wong Sun Doctrine, and the Court said there wasn't sufficient basis for the first consent and there was ample time to secure a warrant.

The point is, Judge, they didn't have any legal basis for the search warrant that is required by law, they went in there on a fishing expedition and I think the case law is clear the thing is illegal and cannot be corrected by the officer advising of Miranda after they get in or after they have got an acquiescence for coming in or something to that effect.

After a recess, the defense put on four witnesses; the two other occupants of the motel room and the defendant who testified that they had not consented to the entry, and one of the detectives whose evidence was substantially the same as that of his fellow officers.

At the end of the defense's evidence, defense counsel argued at some length citing numerous Florida cases the rules of which applied the Fourth Amendment, and Federal cases interpreting that Amendment. Counsel raised the following points:

1. Acquiescence to a search is not necessarily a waiver of a valid search warrant so as to amount to unqualified consent to the search.
2. A Court's finding of consent must be based on the totality of the circumstances surrounding the search and seizure to which objection is made.
3. The State must prove that the consent was freely and voluntarily given, and was not acquiescence to apparent authority.

The prosecutor agreed that, "(T)he Court should look at the totality of the circumstances." He went on to argue that consent for one purpose was effective to waive the warrant requirement for all purposes. He further argued that any communication by Petitioner after he had received his Miranda warnings amounted to a waiver of his rights for all purposes, impliedly including Fourth Amendment safeguards.

Defense counsel rebutted by saying, "Miranda is not magic if it is illegal per se. The search is based on a warrantless entry... There is no legal basis in there for the search of that room."

The trial Court framed and disposed of the crucial question in the following manner:

> It appears to the Court that the critical issue is whether or not Morran, at the time the officer knocked consented.
>
> The Court finds the officers were in the course of an investigation of what may have been a possible felony, that in the course of that investigation they were legally and properly observing the premises, that they had reasonable grounds to make further investigation,

that at the point they approached the door, they had a right to be there, they knocked on the door and announced themselves, and if at that point the defendant consented to entry by the officers then what transpires is legal.

On that critical point, the testimony is in hopeless confusion, contradiction and conflict. The defendant and the two men with him says there was no consent. All of the officers who testified, including the one called by the defendant, said - - testified that entry was made only after they had been invited therein or consent had been gained.

The Court is therefore compelled, due to all of the facts and circumstances surrounding the entry, to apply the testimony of witnesses when facts are in dispute and weigh all the factors. I find the facts justify and the Court is of the opinion that the more credible stories were those told by the officers...

Motion is denied.

Appeal was timely taken to the Second District Court of Appeal. The issue was raised before that Court by brief and oral argument.

The Second District Court of Appeal affirmed the judgment of the trial Court. While no opinion explaining the affirmance was issued by the Court of Appeal, the transcript of the hearing on the

motion to suppress constitutes a record sufficiently detailed to permit review by the Supreme Court of the United States.

Application for review by the Supreme Court of Florida was timely made. That Court declined to review the case on the ground that, under the terms of a recent amendment to the Florida Constitution, it was without jurisdiction. Thus, for this case the Second District Court of Appeal was the State court of last resort.

This Petition for a Writ of Certiorari was filed within sixty days of the date on which the order of the Florida Supreme Court became final.

REASONS FOR GRANTING THE PETITION

This case presents one important question concerning the standard by which a trial court should determine the existence of free and voluntary consent to warrantless search and seizure, in light of the prohibition against unreasonable search and seizure which is embodied in the Fourth Amendment to the United States Constitution. The trial Court denied Petitioner's pretrial motion to suppress. The denial was based on the Court's finding that Petitioner had consented to the search which produced the evidence sought to be suppressed. The finding of consent was in turn based upon the testimony of the State's witnesses, all of whom were law enforcement officers who had taken part in the warrantless entry, search and seizure. Examination of the testimony of the State's witnesses shows that they testified to the consent of Petitioner in a conclusory manner, but that all the rest of their testimony, plus the testimony of Petitioner and the

other occupants of the motel room, indicated that there were many factors present which would militate against a finding of free and voluntary consent, and tended to show rather that there was nothing more than mere acquiescence to a display of authority and a show of force. Nevertheless, the trial Court found that there was consent and denied the motion to suppress, solely on the strength of the officers' testimony that the Petitioner had said, "Come on in," and had thereby waived his Fourth Amendment rights. The Second District Court of Appeal affirmed the action of the trial Court and issued an opinion which stated in full, "Per curiam, Affirmed." The Supreme Court of Florida denied review on the basis of lack of jurisdiction.

The ruling in this case, in effect that consent may be found from the law enforcement officer's opinion that it existed, is without precedent and ignores long lines of cases interpreting the Fourth Amendment in the Federal and Florida Courts. The

"Per curiam, Affirmed" ruling is an affirmation that the action of the lower Court is free of reversible error. The ruling is thus in direct conflict with the rulings of other State courts of last resort and with the rulings of the Supreme Court of the United States and of the lower Federal courts.

The ruling in this case totally ignores the well-established rules that consent, as an exception which justifies an otherwise unreasonable entry and search, must be demonstrated clearly and convincingly by the State with reference to the totality of the circumstances, and that mere acquiescence to authority does not constitute consent where there are no significant intervening factors between the improper action by the police and the act which is relied upon as evidence of consent. The ruling thus also ignores by implication the doctrine of the 'fruit of the poisonous tree' enunciated by this Court in Wong Sun v. United States, 371 U.S. 471 (1963).

That the State has the burden of demonstrating the existence of consent by the adduction of clear and convincing evidence does not appear to be disputed in this case. This principle has been stated quite clearly by Federal and Florida courts. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Ballard, 573 F.2d 913 (C.A.5 1978); Talavera v. State, 186 So.2d 811 (Fla. 2d DCA 1966).

The question of a free and voluntary consent to a search by police officers is a question of fact to be decided with reference to the totality of the circumstances. Brown v. Illinois, 422 U.S. 590 (1975); Schneckloth v. Bustamonte, supra; Mendenhall v. United States, ___U.S.___ (1980); United States v. Robinson, 625 F.2d 1211 (C.A.5 1980); Collins v. State, 310 So.2d 33 (Fla. 2d DCA 1975). While the subjective impressions of the witnesses are to be taken into account, a consideration of all the 'objective factors' is necessary in making a finding of fact on this question of consent. United States v. Turner, 628 F.2d 461 (C.A.5 1980).

The courts have used a bifurcated approach in resolving this question of fact. Given that the entry and search were unreasonable per se and that the unreasonableness is alleged by the State to have been dissipated by defendant's free and voluntary consent, the courts have first asked whether there were any factors present which would taint the consent, i.e. render it less than free and voluntary. Such factors have been categorized as "coercion or duress, expressed or implied" and include the following:

1. The time of day at which the search and seizure took place, United States v. Turner, supra;
2. Whether the officers were displaying weapons, Mendenhall v. United States, supra; United States v. Turner, supra; United States v. Robinson, supra;
3. Whether the officers outnumbered the persons who were subjected to the search, United States v. Turner, supra; Raffield v. State, 362 So.2d 138 (Fla. 1st DCA 1978); Collins v.

State, supra;

When it appears that there were factors present which would clearly taint any consent, then it is customary to require the State to show some independent intervening factor which would support a fair inference that the taint had become sufficiently attenuated to allow the relied-upon consent reasonably to be construed as free and voluntary. Such intervening factors have been held to include the following:

1. The giving of Miranda warnings to avoid violations of a suspect's Fifth Amendment rights, Ballard, supra;
2. The giving of a separate warning that a suspect may refuse to consent to a proposed entry, search or seizure, Schneckloth v. Bustamonte, supra; Bretti v. Wainwright, 439 F.2d 1032 (C.A.5 1971); United States v. Robinson, supra; United States v. Turner, supra; United States v. Fike, 449 F.2d 191 (C.A.5 1971); Correa v. State, 389 So.2d 1204 (Fla. 3d DCA 1980);

3. The passage of sufficient time to allow for dissipation of the taint, Brown v. Illinois, supra; Wong Sun v. United States, supra;

Other factors to be considered are the defendant's subjective impression as to whether he gave his consent, United States v. Turner, supra; and the length of the colloquy between officers and suspect, United States v. Robinson, supra; United States v. Turner, supra. While some of the cases cited herein do not deal with entry by officers onto residential premises, they all deal with the voluntariness of consent to search in light of the prohibitions contained in the Fourth Amendment.

Thus an examination of the officers' testimony reveals that the factual circumstances, and especially the so-called 'objective factors', for the most part militate very strongly against any inference of free and voluntary consent. The entry was made at 1:15 A.M. The officers had their weapons drawn and held so as to be readily usable. There were five officers present as against three occupants of the motel room.

A Miranda warning was given. The officers admitted that there was no notice given of a right to refuse to permit a search. The search and questioning were parts of an ongoing operation which was continuous with the unreasonable entry, the only possible interruption being the reading of the Miranda card.

The Miranda warning is itself an important intervening factor, but does not in and of itself break the chain of causation which leads to a tainted, i.e. coerced, consent. As this Court has said in Brown v. Illinois, 422 U.S., at 603:

> (T)he Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the casual connection between the illegality and the confession...
>
> (T)he question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic device.

The comments of the Court in Brown appear fairly to characterize the situation in the case at bar, where, at 605 the Court said:

> (T)he impropriety of the arrest was obvious: awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning"...The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

In place of 'arrest' one need simply read 'entry into Room No. 40'.

In any case, the 'consent' relied upon by the prosecution and the Court, appears to have been the words of Petitioner, alleged by the officers to have been uttered by him as he opened the door, to wit: "Come on in," or similar words. While such an utterance is one of the factors to be weighed, it is not in itself dispositive of the issue.

In other cases, words which were more indicative of free and voluntary consent have been held insufficient to constitute such a consent, under the circumstances. Where a suspect was faced with a search of his tote bag asked "Do you mind if I open it?", and pulled out several items, the Court found he had not consented to the officer's searching it himself. Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980). Where a defendant testified that when a deputy sheriff asked him if he could 'look around' his dwelling, "I told him 'yes' because I figured I didn't have no other choice, because he could have done it anyway," the Court found no consent, in light of the totality of the circumstances. Talavera v. State, supra. A defendant who was in jail told officers, "I have nothing to hide, you can go there and see for yourself." The Court said, "(H)owever it be characterized, it hardly establishes willing agreement that the officers search the household

without first procuring a warrant." Judd v. United States, 190 F.2d 649 (C.A.D.C. 194).

Thus the factual circumstances do not support an inference of free and voluntary consent. The Miranda warnings, in the words of this Court in Brown, 601, "thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights." The words allegedly spoken by Petitioner as he opened the door to the five armed deputies are insufficient in light of the totality of the circumstances, to attenuate the taint.

Since the trial Court specifically relied upon the testimony of the officers, the evidence discussed in this Petition has been drawn, in the main, from that testimony. Assuming the cogency of the arguments offered hereinabove, all that is left as a basis for the finding of the trial Court is the officer's subjective impression that consent had in fact been given. If reliance is not on the deputies' belief,

then it is not on anything which appears as evidence on the record.

It is conceded that the subjective impressions of the deputies constitute one of the factors to be considered, but it is contended that, inasmuch as there has been shown no significant intervening factor or factors which would operate to dissipate the taint of coercion and per se unreasonableness with which the search was burdened, such subjective impressions are insufficient reason for ignoring countervailing 'objective factors' testified to by the officers themselves.

It has been held that the subjective impressions of a suspect are insufficient to negate an inference of consent drawn from his actions. United States v. Turner, supra. It is submitted that to allow free and voluntary consent to be found from such a mutable basis will completely undermine the safeguards sought to be erected by the Fourth Amendment and extended to the several States by the Fourteenth Amendment.

CONCLUSION

The Petition for a Write of Certiorari should be granted.